Columbus and Southern Ohio Electric Company *and* International Brotherhood of Electrical Workers Local 1466, AFL–CIO. Case 9–CA–19066

17 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 September 1983 Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent's unilateral cessation of a Christmas bonus without bargaining with the Union violated Section 8(a)(5) and (1) of the Act. The judge based this finding on the fact that the "zipper clause" in the collective-bargaining agreement did not clearly and unmistakably waive the Union's right to bargain over items not contained in the agreement. The Respondent contends that the "zipper clause" clearly and unmistakably provided that all agreements and understandings between the parties which existed prior to the current contract were superseded by the current contract. The Respondent argues that the Christmas bonus was such an understanding and since it was not included in the current contract the Union had waived the right to bargain over it. In light of such waiver the Respondent contends it could lawfully cease paying the bonus. We find merit in the Respondent's position.

Before a waiver of the duty to bargain will be found, there must be clear and unmistakable evidence of the parties' intent to waive this right. Such evidence is gleaned from an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement. *Bancroft-Whitney Co.*, 214 NLRB 57 (1974). See also *NLRB v. Henry Vogt Machine Co.*, 718 F.2d 802 (6th Cir. 1983); and *NLRB v. Southern Materials Co.*, 447 F.2d 15 (4th Cir. 1971).

An examination of the parties' bargaining history reveals the following: The Respondent and the Union have been parties to collective-bargaining agreements for approximately 40 years. The Christmas bonus was not set forth in any of the collective-bargaining agreements and had been discussed during the 40-year relationship only twice. With only one exception the Respondent had provided the employees a Christmas bonus every year since 1942. The bonus was at least 1 percent of the employee's straight time annual earnings.

In the most recent collective-bargaining agreement which became effective in August 1982[2] the parties agreed to a "zipper clause" which read as follows:

> It is the intent of the parties that the provision of this Agreement will supersede all prior agreements and understandings, oral or written, expressed or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.
>
> The Union for the life of this Agreement hereby waives any rights to request to negotiate or to bargain with respect to any matters contained in this Agreement.

During bargaining for this contract the Respondent and the Union engaged in approximately 26 negotiating sessions. The zipper clause was presented to the Union as part of the Respondent's first offer. It was discussed during contract negotiations and the union representative acknowledged understanding it. The Union requested the Respondent to provide a list of all agreements which would be terminated pursuant to the provisions of the zipper clause. By letter the Respondent informed the Union it could not honor this request as it did not maintain such a list. In this letter the Respondent stated:

> [T]o avoid any misunderstanding as to the Company's intention, our letter of April 19, 1982, notified you that we wish to terminate

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also asserts that the judge's decision is the result of bias. After careful examination of the entire record we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." See generally *Jack August Enterprises*, 232 NLRB 881 (1977).

[2] All dates are 1982 unless otherwise indicated.

> all agreements, effective . . . July 15, 1982. By specifying "all" agreements, we feel we have made our notice clear and unambiguous. "All": means just that—all. What we have done through our 8(d) notice was to wipe the slate clean before the new contract goes into effect.

After receiving this letter the Union filed a charge with the Board contending the Respondent's refusal to provide such a list constituted a violation of Section 8(a)(5). In dismissing the charge the Regional Director by letter of 6 July stated:[3]

> [T]he Employer's proposal was nothing more than an attempt to clear the tables so that all matters were subject to inclusion within one written agreement.

Pursuant to the Board's Rules and Regulations, the Union appealed the Regional Director's decision to the General Counsel. In this appeal the Union stated:

> The Employer's position is broad. It covers past practices, arbitrator's awards as to the interpretation and scope of contract language, oral agreements which over the course of years have been perpetuated into practices, and written understandings which also over the course of years have been perpetuated into practices.

The appeal was denied by letter of 29 July. Full agreement on a new contract was not reached until 25 August. In spite of all this at no time did either side broach the subject of the Christmas bonus.

An examination of the contract language reveals that the parties clearly agreed that the provisions of the collective-bargaining agreement will "supersede all prior agreements and understandings" and that the collective-bargaining agreement would govern the parties' "entire relationship" and be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder *or otherwise.*" (Emphasis added.)

A review of the complete contract indicates that the parties entered into an agreement addressing an entire spectrum of issues. These issues include many types of compensation for such occasions as funeral leave, personal use of an automobile, and jury duty. The collective-bargaining agreement also contains detailed provisions concerning wage rates.

[3] In relying on the Regional Director's dismissal letter we are not finding that the letter is determinative of the merits of the issue. We find this letter, along with the Union's stated position on appeal and the other factors set forth above, constitutes evidence that the Union was fully aware that all previous agreements were subject to the zipper clause.

Based on all of the above we conclude contrary to the judge that the zipper clause agreed to by the parties constituted a clear and unmistakable waiver of the Union's right to bargain over the elimination of the Christmas bonus. The Respondent's cessation of the Christmas bonus therefore did not constitute a refusal to bargain in violation of Section 8(a)(5) of the Act and we shall dismiss the complaint.[4]

ORDER

The complaint is dismissed.

[4] Member Zimmerman agrees that the zipper clause represents a clear and unmistakable waiver of the Union's right to bargain over the elimination of the Christmas bonus. The judge's refusal to find such a waiver is based solely on his determination that the bonus was, historically, a unilateral action by the Respondent rather than an agreement between the parties and therefore was not covered by the zipper clause which, in his view, addressed only bilateral agreements between the parties. This interpretation of the intended coverage of the zipper clause is belied by the evidence. The clause does not refer only to agreements, but also to "understandings" which could well be based on a unilateral practice. Further, when the Union requested a list of all matters subject to the clause, the Respondent refused to make such a list, clearly stating that its intention was to wipe the slate clean before the new contract went into effect. Finally, when the Union appealed the Regional Director's dismissal of its charge that the Respondent violated the Act by refusing to list all the matters covered by the clause, the Union stated, "The Employer's position is broad. It covers past practices . . . and written understandings." It is therefore, clear from the Union's stated position on appeal that it did not view the clause as limited to agreements between the parties, but instead found it to be a broad clause covering past practice as well. Given this background, one must conclude that, when the Union signed the collective-bargaining agreement containing the zipper clause, it was aware of the reach of the clause to such practices as the Christmas bonus and thus waived its right to bargain over such matters.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. This case was heard in Columbus, Ohio, on March 21, 1983. The underlying unfair labor practice charges were filed on December 15, 1982, by the International Brotherhood of Electrical Workers Local 1466, AFL-CIO (the Charging Party or Union), and gave rise to an order consolidating cases, consolidated amended complaint and notice of hearing dated January 18, 1983.[1] The essence of the allegations is that Columbus and Southern Ohio Electric Company (Respondent or Company), unilaterally ceased payments of an annual Christmas bonus which had long been given to unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain, thereby violating Section 8(a)(5) and (1) of the National Labor Relations Act.

The Respondent filed an answer conceding, inter alia, jurisdictional facts but denying all allegations that it committed any unfair labor practices. In particular, the Respondent's defense is predicated on a "zipper clause" in the current labor contract which, it contends, super-

[1] The instant case had been consolidated with Case 9-CA-18607-3. After the hearing opened, the latter case, involving the same parties, was severed and submitted directly to the Board on a stipulated record.

sedes the long time practice of providing an annual Christmas bonus to employees. Moreover, the Respondent asserts that the Union was afforded "ample opportunity to bargain, which the Union spurned." As such, the Respondent argues that the Union waived any rights it may have had to bargain over this subject.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after careful consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Columbus and Southern Ohio Electric Company, is an Ohio corporation and is engaged as a public utility in the generation, transmission, distribution, and sale of electrical power and related products. During the past 12 months, a representative period, the Respondent, in connection with the aforenoted business operations, derived gross revenue in excess of $250,000. During the same period, the Respondent purchased products, goods, and materials valued in excess of $50,000, which products, goods, and materials were received at its various Ohio facilities directly from points outside the State of Ohio. It is alleged, the Respondent admits, and I find that said Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the International Brotherhood of Electrical Workers Local 1466, AFL-CIO, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent and the Union have been parties to a series of successive collective-bargaining agreements spanning some 40 years. With one exception, since around 1942, the Respondent has unilaterally provided its employees with an annual Christmas bonus. In 1982, the unit employees did not receive the Christmas bonus for the first time. In all that time, none of the labor contracts ever made reference to the Christmas bonus. However, on two occasions (not with regard to the most recent contract), the Union had asked for an increase in the size of the bonus as part of its overall contract proposals. This the Respondent refused to do and the item was then dropped from the agenda.[3]

By a letter dated April 8, 1982,[4] Union Business Agent William Hamler notified Respondent Employee Relations Manager Norman Hitzeman of the Union's desire to open up negotiations of the collective-bargaining agreement then in effect through July 14, 1982 (Jt. Exh. 3). Hitzeman responded by letter dated April 19 and agreed to meet with the Union on May 3 for the purpose of negotiating a new agreement. (Jt. Exh. 4). In pertinent part, Hitzeman also notified Hamler as follows:

> The Company also hereby notifies you that it wishes to terminate all other agreements, written or oral, between the parties, whether such agreements be in the forms of letters, memoranda, grievance settlements or in any other form. The one exception to the above is the Retirement Income Plan agreement which by its terms remains in effect through July 15, 1986, unless reopened by mutal agreement of the parties [id].

The parties met on May 3 and exchanged proposals for a new contract. The Respondent's proposals for the first time included a zipper clause. (Jt. Exh. p. 4). The so-called zipper clause in its entirety was as follows:

> 2. It is the intent of the parties that the provisions of this agreement will supersede all prior agreements and understandings, oral or written, express or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.
>
> The Union for the life of this Agreement hereby waives any rights to request to negotiate, or to negotiate or to bargain with respect to any matters contained in this Agreement.

The first bargaining session was brief with little accomplished other than the exchange of contract proposals. Nothing was said on that occasion with regard to the zipper clause. Hamler, by letter to Hitzeman, dated May 7, made reference to article II, section 2 (zipper clause) and asked the latter to provide all agreements the Respondent wished to terminate in order for the Union "to appreciate and understand the scope of the proposed new contract" (Jt. Exh. 7). Hitzeman responded by a letter dated May 14, stating that the Company was unable to honor any request because it does not maintain such a list. He added however that "to avoid any misunderstanding as to the Company's intention" it desired to terminate "all" agreements and wipe the slate clean before the new contract goes into effect. (Jt. Exh. 8.)

The parties next met on or about May 19 in Lancaster, Pennsylvania, where they went through each item of the proposed contract. When the parties arrived at article II, section 2, Hamler was asked if he understood that provision to which he responded affirmatively and the parties then went on to the next item. Hamler, however, made reference to the Company's intention to terminate all side agreements but when he could not get the Respond-

[2] In accordance with arrangements made at the hearing, the General Counsel's unopposed "request" to receive in evidence a two-page document dated December 16, 1982, dealing with 1983 Operation and Maintenance Revisions, as G.C. Exh. 7, is hereby granted.

[3] It is undisputed that, initially, the Christmas bonus was calculated on 1 percent of the employee's gross annual earnings including overtime pay. According to the Respondent, the formula was changed in 1960 to 1 percent of the employee's straight time annual earnings. The Union denied that the initial formula which included overtime pay was ever changed.

Documentary evidence relative to the Christmas bonus formula was not offered by any party.

[4] All dates hereinafter refer to 1982 unless otherwise indicated.

ent to offer a list of said agreements, he stated that the Company would be hearing from the NLRB.[5] Again, nothing was said about the Christmas bonus. In all, the parties conducted approximately 26 negotiating sessions when on August 25 the parties reached full agreement with ratification and then executed the collective-bargaining agreement. It is undisputed that at no time prior thereto had either of the parties made express reference to the Christmas bonus and the contract itself is silent on the subject. (Jt. Exhs. 1–2.)

On November 23, approximately 3 months after the contract was executed, the subject of the Christmas bonus came up in a meeting between company and union representatives. The Respondent asked for this meeting which was attend by Hitzeman, Parks Deaton, manager of labor relations generation, and Otis Miller, manager of labor relations operation, on behalf of the Company and Hamler and Thomas Davis, vice president of the local for the Union. While it is undisputed that the meeting was about the Christmas bonus, Hamler and Davis dispute the account of that meeting as provided by Hitzeman.[6] According to Hitzeman, he alerted Hamler and Davis that the Respondent was contemplating discontinuing the Christmas bonus and wanted input from the union representative on this subject before any decision was reached. Hitzeman explained to the union officials that the Company at that time was in the middle of a big cost reduction program which was further described in a bulletin board announcement and in other material published by the Company, copies of which were then furnished to Hamler and Davis. (G.C. Exh. 4.) Davis asked Hitzeman about the Company's intentions to grant a Christmas bonus in the future and the latter responded that the Company intended to discontinue the Christmas bonus for future years as well. Hitzeman testified that he alerted Hamler and Davis that if the decision were made to discontinue the Christmas bonus that they could expect a letter from Ben Ray, president of the Respondent, to the employees advising them of such action.

As noted previously, the account provided by Hamler and Davis regarding the November 23 meeting was substantially different from the version given by Hitzeman. According to Hamler and Davis, Hitzeman announced on that occasion that the Respondent was going to discontinue the Christmas bonus. Further, Hitzeman told them that a letter would be forthcoming from President Ray advising the employees of this action. Hamler questioned Hitzeman whether the Respondent was taking this action due to an inability to pay and that the latter responded in the negative. Hamler and Davis do acknowledge that Hitzeman showed them published material on the subject of the Respondent's cost-cutting measures. The union officials denied that they were given any opportunity to bargain over the Company's decision to discontinue this bonus. Hamler told Hitzeman that the employees were entitled to the bonus and would consider filing a grievance to protect them.

A grievance was filed and signed by Hamler and Davis on November 29, stating as follows:

> On Tuesday, November 23, 1982, Mr. Hitzeman, Manager of Employee Relations called Mr. Tom Davis and myself in an told us that there would be *NO XMAS GIFT* paid this year, 1982. [G.C. Exh. 3.]

According to Hitzeman and Deaton, Hamler and Davis showed them the grievance on November 29 but that Hitzeman would not accept it, because under the zipper clause it was not an appropriate subject. Further, they assert that the union officials were given an additional opportunity to discuss the subject of the Christmas bonus. They denied that any decision had been made at that time to discontinue the bonus. According to Hitzeman, the final decision to discontinue the bonus was not made until December 1. Hamler and Davis on the other hand denied that any meeting took place on November 29 or that they had any conversation with Hitzeman and Deaton on that occasion. Hamler testified that he intended to deliver the grievance on November 29 to Hitzeman but that the latter was elsewhere and he, Hamler, then handed the grievance to Hitzeman's secretary, and then left the area.

By letter dated December 2, addressed to all employees, President Ray advised them "Our Christmas gift is being discontinued." He explained "the Company's fast-deteriorating financial condition made this step necessary." (G.C. Exh. 3.) Hamler testified that the first time that the formal grievance over the discontinuance of the Christmas bonus was discussed was at a meeting on December 3, after the aforenoted letter was sent to the employees. Within the next 2 weeks, the Union filed the instant unfair labor practice charges. (G.C. Exh. 1(i).)

B. *Discussion and Conclusions*

1. The zipper clause

The facts and circumstances, up until the time the Respondent first made reference to discontinuing the Christmas bonus at a meeting on November 23, are largely undisputed. Thus, it is undisputed that during the long collective-bargaining history with the Union, spanning some 4 decades, Respondent had unilaterally provided unit employees an annual Christmas bonus, without interruption, until December 1982, when this practice was discontinued. Further, it is undisputed that, during the aforenoted period, none of the collective-bargaining agreements, the most recent of which by its terms is effective August 25, 1982, through July 14, 1985,

[5] On May 25, the Union filed 8(a)(5) charges alleging that the Respondent refused to provide "a list and summary of all agreements and understandings, oral or written, expresssed or implied, which the Company believes to be of contractual effect, which information is necessary for the Charging Party in bargaining for a new contract." (R. Exh. 2.) The Regional Director dismissed the charges by letter dated July 6 noting therein, inter alia, that "the employer cannot be expected to supply the Union with information it does not have." (R. Exh. 3.) An appeal thereon was denied on July 29. (R. Exh. 5.)

[6] As noted above, *Deaton* and *Miller* attended this meeting but neither one of them provided corroborative testimony for that occasion. Miller did not testify nor was any reason advanced for the failure to call him as a witness.

makes reference to the Christmas bonus.[7] Still further, it is undisputed that the subject of the Christmas bonus was not mentioned at all during the most recent contract negotiations covering approximately 26 bargaining sessions, which culminated in the current collective-bargaining agreement.

The Respondent acknowleged that the annual Christmas bonus had become a term and condition of employment and but for the "zipper clause" it could not have lawfully discontinued this benefit, unilaterally. However, the Respondent contends that, when the parties mutually agreed to the broad and unambiguous wording of the zipper clause in the current labor contract, the Union had thereby waived any rights it might have had otherwise to bargain over subjects not mentioned therein, such as the Christmas bonus.[8] Accordingly, the Respondent contends that it was free to discontinue this benefit, unilaterally.

Both the Board and the courts have long maintained that a waiver of 8(a)(5) rights must be "clear and unmistakable." See *NLRB v. Pepsi Cola Distributing Co.*, 646 F.2d 1173, 1175 (6th Cir. 1981), cert. denied 456 U.S. 936 (1982); *General Electric Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969), cert. denied 396 U.S. 1005 (1970); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); *C & C Plywood Corp.*, 148 NLRB 414, 416 (1964), affd. 385 U.S. 421 (1967). In determining whether the waiver is "clear and unmistakable," the contractual language as well as the negotiations surrounding the contract are evaluated. See *Angelus Block Co.*, 250 NLRB 868, 877 (1980); *McDonnell Douglas Corp.*, 224 NLRB 881, 895 (1976). A waiver of such statutory rights shall not be lightly inferred. *Rockwell International Corp.*, 260 NLRB 1346 (1982); *Pepsi-Cola Distributing Company of Knoxville*, 241 NLRB 869, 870 (1979); *C & C Plywood Corp.*, supra.

Mindful of the foregoing, it is noted that nothing was said about the Christmas bonus leading up to the first labor contract between the parties which contains the zipper clause. On the other hand, it is also noted that the zipper clause was expressly referred to during negotiations and Hamler professed to have understood its meaning. However, Hamler denied at the trial that he understood that agreeing to the language proposed by the Company potentially placed the Christmas bonus in jeopardy. Hamler, in explaining, noted, inter alia, that the Respondent's proposal comprised 97 pages and resulted in 27 major changes in the current agreement. According to Hamler, the zipper clause pertained to these matters, as well as any other side agreements or mutual understandings thereon not expressly contained in the contract. As the Christmas bonus had never been the product of any understanding or side agreement between the parties, I accept as plausible Hamler's representation that he had "no idea" that this subject was intended to be encompassed by the disputed clause. Indeed, the Respondent's statements, both oral and written, appear to have contributed to this more limited perception by Hamler, vis-a-vis the scope of the clause.

Thus, within days after the parties first exchanged proposals, Hamler by letter to Hitzeman dated May 7 noted that the zipper clause provided "that the new Agreement will supersede all prior agreements and understandings, oral and written, expressed or implied," between the parties and requested a list of such agreements and understandings "which the Company believes to have contractual effect."

By letter dated May 14 (Jt. Exh. 8), Hitzeman denied the existence of any such list pointing out that "Over the years, the parties have come to so many *side agreements* that it would be virtually impossible to draw up an accurate list." (Emphasis added.) Hitzeman added that "even if there were such a list, it would be highly unlikely that the parties could agree on the meaning of the agreements and on which ones are still in effect." Further, Hitzeman explained, "By specifying 'all' agreements, we feel we have made our notice clear and unambiguous. 'All' means just that—all." Hitzeman then stated that the purpose of the provision was to "wipe the slate clean before the new contract goes in effect."

Nowhere in the aforenoted response does Hitzeman make reference to any term or condition of employment which evolved as a matter of practice such as the annual Christmas bonus. As noted previously, it is undisputed that the Christmas bonus was not the product of any agreement between the parties but rather a benefit which had long been conferred on unit employees by the Respondent, unilaterally. As such, this matter appears to be totally outside the plain meaning of Hitzeman's letter. While Hitzeman also stated that the purpose was to "wipe the slate clean," I do not find such expression, without more, in the total context of his letter, manifests an intent to include benefits or other terms and conditions of employment which had not previously resulted from agreement of the parties. In this connection it is noted that Hitzeman made no attempt to define "understandings" but rather appears to use that term and "all prior agreements" interchangeably.

In addition, Hitzeman, in subsequent negotiating sessions, spurned other opportunities to clear up doubts regarding the meaning of "wiping the slate clean" or the "zipper clause" otherwise, by merely confirming for

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[7] As noted previously on two occasions once in 1973, again in 1977, the Union's proposal included an item referable to increasing the size of the bonus. In 1973, the Respondent, in rejecting this item, pointed out that the Christmas bonus had not been in any prior agreement or the subject of negotiations and the matter was dropped. Similarly, there is no evidence tending to show that the parties negotiated on the subject of the Christmas bonus in 1977, before the Union dropped this item from its proposals.

[8] The zipper clause (also set forth previously) in its entirety reads as follows:

Article II

. . . . .

Section 2. It is the intent of the parties that the provisions of this Agreement will supersede all prior agreements and understandings, oral or written, expressed or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.

The Union for the life of this Agreement hereby waives any rights to request to renegotiate or to negotiate or to bargain with respect to any matters not contained in this Agreement.

Hamler examples of side agreements,[9] instead of advising him that the provision applied also to all "subjects" not contained in the labor contract. Respondent failing to do so and absent such catchall language in the provision itself, I find that its heavy reliance on *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981), and *NLRB v. Southern Materials Co.*, 447 F.2d 15 (1971), to support a "waiver" contention is unfounded, as both Fourth Circuit cases are factually distinguishable. In particular, the "zipper clause" language in the cited cases is distinctly broader than that found in the instant case. Thus, the "zipper clause" waiver in both *Aeronca* and *Southern Materials* not only removed any midterm obligation to bargain over terms and conditions expressed in the labor contracts but also in nearly identical language extended "*to any subject matter not specifically referred to or covered in [the] Agreement.*" (Emphasis added.)[10] Moreover, in *Aeronca*, which involved the discontinuance of a turkey bonus, the court also noted that the union, inter alia, proposed and later dropped a "maintenance-of-benefits" provision after it had mentioned the turkey bonus during a caucus.

By contrast, in the case at hand, the Union had not proposed a change in the Christmas bonus nor had the "subject" been broached by either party in any form during the negotiations leading to the most recent contract. Indeed, the Respondent admittedly had not contemplated discontinuing the Christmas bonus until months after the contract was executed. While the Respondent also advised the Union that, by virtue of the zipper clause, it intended to wipe the slate clean, I have found for reasons stated previously that it was plausible for the Union to presume that this pertained only to all agreements, side agreements, and understandings arrived at mutually by the parties and not to the Christmas bonus, which for some 40 years without interruption had always been provided by the Respondent unilaterally.[11]

In the total circumstances of this case, noting particularly that the parties had not mentioned the Christmas bonus during negotiations nor had the Respondent then even contemplated any change, I am persuaded that the Union had not consciously yielded its statutory right to bargain over this benefit. As I also find that the zipper clause itself is not "unambiguous" or "clear and unmistakable," I reject the Respondent's assertion that the provision constituted an effective waiver.

2. The opportunity to bargain

Having found that the Union had not waived its statutory right to bargain over the discontinuance of the Christmas bonus by virtue of the zipper clause, the question remains as to whether the Union's acts and conduct constituted a "waiver" at any time after the contract was executed. According to the Respondent, the Union was afforded "ample opportunity to bargain, which the Union spurned." The Union, other other hand, denied that it was given an opportunity to bargain but, rather, contends that it was presented only with a fait accompli. A determination of this issue turns largely on credibility.

It is undisputed that the parties first touched on the subject of the Christmas bonus at a meeting on November 23, some 3 months after the labor contract was executed. As noted previously, what transpired on that occasion, in critical respects, is in dispute.

According to Hitzeman, on the occasion in question, he alerted Hamler and Davis that the Respondent was merely contemplating discontinuing the Christmas bonus and invited input from them before any decision was reached. This is contradicted by both Hamler and Davis. According to them, Hitzeman did not leave room for bargaining but rather declared that the Respondent was discontinuing the bonus, adding that the employees would also be so advised in a letter from Ben Ray, president of Respondent. Hitzeman admitted making reference at that time to the forthcoming letter from President Ray but insisted that no decision had yet been made.

Hamler testified with corroboration from Davis that he asked Hitzeman whether the Respondent was claiming inability to pay and the latter responded in the negative. Hitzeman showed them a company publication entitled "Litelines" dealing with, inter alia, cost-cutting measures, although this material was silent on the subject of the Christmas bonus. According to Hitzeman, this was done to give the Union "background information." It is also undisputed that Davis asked Hitzeman whether the Respondent was taking this action only for that year or also for the future and was told by the latter that the respondent intended to discontinue the Christmas bonus permanently.

Further, it is undisputed that Hamler objected to the Respondent's action, *promising* and threatened to go to court and/or arbitration for relief. To this, Hitzeman told Hamler, "I don't believe that this is a matter for an arbitrator. The subject is not in the contract. What is in the contract now is a zipper clause and that superseded all past agreements and practices."

[9] The side agreements, all in writing, involved call out procedures, vacation splitting, and inclement weather. Cf. *Speidel Corp.*, 120 NLRB 733 (1958) (insurance premiums); *McDonnell Douglas Corp.*, supra (Christmas and Easter bonuses), where the Board found contractual waivers, noting in both situations that the union executed the contract despite warnings by the employer that he was no longer obligated to provide the precise benefits in question.

[10] In *Aeronca*, to these words are added:

> . . . even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed [the] Agreement. [Supra at 502 fn. 1.]

Similarly, the Board cases cited by Respondent, where effective waivers were found pursuant to zipper caluses, are clearly distinguishable by, inter alia, the breadth of those provisions. See *GTE Automatic Electric Inc.*, 261 NLRB 1491 (1982); *Radioear Corp.*, 214 NLRB 362 (1974); *Bancroft-Whitney Co.*, 214 NLRB 57 (1974).

[11] Cf. *Bancroft-Whitney Co.*, supra, where, inter alia, the employer had withheld an annual wage dividend long provided but there, unlike the instant case, the matter had been brought directly and openly to the union's attention during negotiations for an initial collective-bargaining agreement. In addition that initial contract eventually provided that "all wages and other benefits to be received are contained in this agreement." The Board found that the union had clearly waived any right to bargain about the payment of the annual wage dividend during the term of that contract. See also cases cited previously at fn. 9.

While it is admitted that Hamler, on November 29, filed a grievance over the action taken by Hitzeman at the meeting of November 23, nearly everything else that transpired relative to the Christmas bonus on November 29 is in dispute. According to Hamler, he had hoped to serve the grievance personally on Hitzeman but, as the latter was not in his office, the grievance was left with Hitzeman's secretary. This was disputed by Hitzeman who testified, with some corroboration from Deaton, that Hamler presented the grievance to him in his office on November 29 and that a meeting was then held (denied by Hamler and Davis), attended also by Deaton and Davis.

According to Hitzeman and Deaton, the grievance was rejected on November 29 because of the zipper clause but the Union was nonetheless afforded an opportunity to discuss the bonus situation and ask questions pertaining thereto.

I find the testimony of Hamler and Davis, inter alia, more consistent and plausible than that of Hitzeman and Deaton. For example, while Hitzeman testified that Hamler asked for the November 29 meeting, Deaton attributes this meeting to Hitzeman. Thus, Deaton testified that, on November 29, Hitzeman told the union representatives that he called the meeting to notify them that "the company was considering discontinuing the Christmas gift" and to give "[the Union] an opportunity to discuss and ask questions." As the Union had already been told about the bonus situation by Hitzeman on November 23, it appears to serve no purpose and I reject Deaton's testimony ascribing to Hitzeman the same statement less than 1 week later.

Deaton also departed from Hitzeman as to when Hamler stated that he would seek assistance from "Judge Duncan," testifying that the statement was made on November 29, whereas Hitzeman ascribed the statement to Hamler at the meeting of November 23. While Deaton may have been confused as to dates, it does not inspire confidence in the accuracy of his recall nor satisfy me that his testimony was corroborative for purposes of crediting Hitzeman regarding the disputed meeting of November 29.[12]

Of greater significance, and I find even more revealing in terms of assessing what is most plausible and overall credibility is the admitted posture taken by Hitzeman, regarding the grievance itself. As noted previously, Hitzeman in rejecting the grievance told Hamler, "the subject [Christmas bonus] is not in the contract. What is in the contract now is a zipper clause and that superseded all past agreements and practices."

Given the stance taken by Hitzeman vis-a-vis the grievance and noting particularly that he relied on the "zipper clause," I am unpersuaded that the Respondent would not rely on the same factors and refuse also to negotiate. Hitzeman's explanation that he was willing to negotiate on the advice of counsel, in order to be doubly sure, is not compatible with the total circumstances nor supported by credible testimony otherwise. Rather, it appears that the Respondent did no more than create the illusion of bargaining instead of engaging in "genuine" negotiations.[13]

As I find that Hamler and Davis were mutually corroborative and as I was otherwise impressed with their demeanor and overall testimony, I credit and their testimony in all critical areas. As such, and after careful observation and assessment of the demeanor of all witnesses, and on the basis of the entire record, I credit Hamler and Davis over Hitzeman and Deaton in all critical respects.

On the basis of the totality of the circumstances including credibility resolutions, I find that the Respondent did not afford the Union with any reasonable or meaningful opportunity to bargain over its decision to discontinue the Christmas bonus. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act representing the appropriate unit of:

> All employees in the electrical division of the [Respondent's] Columbus and Southern Districts including the Picway, Poston and Conesville Generating Stations, working foremen (including line foremen "C"), relay technicians, control operators, surveyors, surveyors' assistants, instrument men and janitors, and, in the Columbus District, only, meter readers and divisional clerks, but excluding both Districts, general office employees, guards (company police), technical engineers, salesmen and professional employees and supervisors, as defined in the Labor Management Relations Act of 1947, as amended.

3. The Respondent and the Union have at all times material herein been parties to a collective-bargaining agreement coverng the employees in the above-described unit.

4. By unilaterally deciding to discontinue its past practice of providing unit employees an annual Christmas bonus and then discontinuing said Christmas bonus, without affording the Union a reasonable opportunity to bargain, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommended that it be required to cease and desist therefrom and that it take

[12] Nor did the failure by the Respondent to call its Manager of Labor Relations *Otis Miller*, who also attended the meeting of November 23, tend to enhance the credibility of *Hitzeman* with regard to that occasion.

[13] While clearly not decisive, it is noted that *Hitzeman* admittedly never expressly used the term "negotiate."

certain affirmative action designed to effectuate the policies of the Act, including, on request, to bargain with the Union as the exclusive bargaining representative of unit employees about the Christmas bonus.

As the Respondent's unfair labor practices consist of unilaterally discontinuing its practice of providing its unit employees an annual Christmas bonus, bonus constituting an established benefit of employment, I shall recommend that the Respondent make said unit employees whole for the loss of benefits due them by paying them in accordance with their long-existing formula.[14] See, e.g., *Pepsi-Cola Distributing Co.*, supra at 871. Further, interest is to be paid in accordance with the Board's normal practice in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[15]

[Recommended Order omitted from publication.]

[14] While not central to this case, it is noted that *Hitzeman* asserted that the formula used to calculate the Christmas bonus was changed in 1960. However, *Hitzeman* has been with the Respondent only since 1981 and no documentary evidence or corroborative testimony otherwise was introduced. On the other hand, *Hamler*, whose seniority with the Respondent dates back to 1941, testified that the formula has always been "1 percent of the base year which is 2,080 hours." While I have credited *Hamler* in all critical respects, I find it more appropriate to leave a determination of the precise formula for the compliance stage.

[15] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).